

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of R. T. and the Duneland School)
Corporation and Porter County Educational) **Article 7 Hearing No. 1119.99**
Interlocal)

The parent initiated the request for a hearing in this matter and an Independent Hearing Officer (IHO) was appointed. After the first day of hearing, the parent's advocate raised concerns as to the IHO's impartiality, and the IHO recused himself. A second IHO was appointed who then concluded the hearing and issued a decision. The school has appealed the IHO's decision.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

The parent requested a due process hearing seeking reimbursement for the unilateral placement of the Student in a private residential school for the 1998-1999 school year and also questioning whether the school complied with all procedures required under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Sec. 504), and the Americans with Disabilities Act (ADA). The parent's request for a hearing was received by the Indiana Department of Education (IDOE) on September 14, 1999 and an IHO was appointed that same day. A telephone prehearing conference was held on September 22, 1999, with a prehearing order issued on September 28, 1999. The school appointed the IHO as the hearing officer to hear Sec. 504 issues with one hearing and one decision with the Sec. 504 issues clearly noted. The hearing was scheduled for November 18 and 19, 1999. Several additional prehearing orders were issued to deal with discovery matters and subpoenas.

At the start of the second day of the hearing, on November 19, 1999, the parent's advocate raised concerns as to the IHO's impartiality, and the IHO recused himself. On November 22, 1999, a second IHO was appointed. A telephonic prehearing conference was conducted and a prehearing order issued on December 3, 1999. The orders of the previous IHO were to remain in effect. The school requested a continuance of the hearing until after January 1, 2000. This request was granted over the objections of the parent, with new hearing dates scheduled for January 3, 4, 5, 6, and 7, 2000. The parent requested the school to pay the parent's cost for the hearing. The IHO indicated he lacked the authority to award such costs, but the parent could seek fees and expenses in court if the parent prevailed. The parent requested the hearing be *de novo*, to which the school objected and requested the IHO review the transcript of the six witnesses who previously testified. The IHO indicated he would review the transcript. The parent also requested the issues be amended to add whether the parent is entitled to reimbursement for the private education expenses incurred during the 1999-2000

school years. The school objected to amending the issues and the IHO declined to amend the issues.

The parent subsequently filed a request for another due process hearing to address the issues of reimbursement for the 1999-2000 school year and prospective payment for the 2000-2001 and 2001-2002 school years. Another IHO was appointed for these issues in Article 7 Hearing No. 1139.99. After various pleadings, motions and conferences in the two hearings, the parties, on January 3, 2000, stipulated to the consolidation of all issues in this hearing. The final issues identified for hearing in this matter were:

1. Is the parent entitled to reimbursement for the private education expenses that she incurred during the 1998-1999 school year, the 1999-2000 school year, and prospectively for the 2000-2001 and 2001-2002 school years? and,
2. Did the district comply with all procedures required under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act?

The IHO issued his written decision on January 19, 2000. The IHO found the Student to be sixteen years old and a 10th grade student at a private school for students with learning disabilities. The Student attended the local school from kindergarten through the eighth grade. While in the third grade, the school's evaluation of the Student indicated grade equivalency scores of 2.3 in reading decoding, 2.4 in reading comprehension, 2.1 in spelling, 2.0 in letter word identification, and 1.8 in dictation. The Student had difficulty in all written tasks. The Student's IQ scores were: Verbal - 108; Performance - 104; and Full Scale - 107.

The Student's third grade teacher noted the Student had poor word attack skills, poor writing, poor auditory performance, was unable to sound out words, jumbled letters, reversed letters, was poor in spelling, and if he read his tests, he failed. The case conference committee (CCC) determined the Student to be eligible for special education as a learning disabled student in the areas of basic reading, reading comprehension, and written language, finding the Student to have poor word attack skills, poor sight word vocabulary, and difficulty in decoding unknown words.

The Student's individualized education program (IEP) developed in February, 1993, provided for goals of (a) improve written skills, including spelling; and (b) improve reading decoding and comprehension skills. The Student received support services in reading and written language while in the regular classroom. The Student remained eligible for special education as a learning disabled student in the same areas during his 4th, 5th and 6th grade years. Standardized achievement tests administered during 4th and 5th grade showed the Student scoring below average in spelling and math computation.

After the three-year re-evaluation while the Student was in the 6th grade, the March 18, 1996, CCC continued to find the Student eligible for special education as a student with a learning disability. The results of the evaluation found the Student's IQ to be as follows: Verbal - 110; Performance - 99; and Full Scale - 105. The Student was weak in the areas of spelling and grammar. The Student

attained a standard score of 91 in letter word identification with a grade equivalency of 5.4; a standard score of 97 in broad reading with a grade equivalency of 5.2; and a standard score of 87 with a grade equivalency of 4.8 in broad written language. The IEP had an annual goal to improve communication skills. The February 4, 1997, CCC continued to find the Student eligible for special education in learning disabilities in the areas of basic reading, reading comprehension and written expression. The Student passed from grade to grade and was receiving good grades in school, predominately Bs.

The Student received daily resource room services including phonetic-based exercises, sight words, and was provided with a computer program to assist him with written language problems. The Student's middle school learning disability teacher worked with the Student throughout middle school, including a number of team-taught classes. The Student stated he received little real assistance from this teacher. During the Student's 8th grade year, a phonics-based program was introduced due to the parent's concern about the Student's reading ability. The Student used this computerized program for only a short time as he received no assistance from the teacher and was made fun of by other students.

Although the Student's math teacher was available to help the Student before or after school or during the all-school study period, the Student did not seek his help outside of class. The Student did his homework at home with his mother's assistance. The Student also had the teacher's teaching manual so he merely copied answers. The Student scored below average on the ISTEP+ administered in October, 1997, in reading, vocabulary, total reading, math computation, and total math.

The Student's mother spent more and more time helping with the Student's homework. She felt that he was regressing, not learning, and was unable to read. She obtained an independent evaluation from a learning disability specialist which found the following IQ scores: Verbal - 119; Non-verbal - 91; Memory - 102; and Composite - 104. The Student was found to have auditory processing problems, phonological awareness problems, difficulties in decoding words and in spelling. The Student's reading comprehension was far below his listening comprehension and his reading rate was very slow. The Student had significant problems in written language and in mathematics. The evaluator concluded the Student had moderate to severe learning disabilities and recommended intensive individualized reading remediation in decoding basic words and sounds and word attacks by qualified teachers. The evaluator recommended an extended school year for six weeks during the summer of 1998.

The April 9, 1998, CCC reviewed the results of the independent evaluation and recommended the Student remain eligible for special education services as learning disabled in the areas of basic reading, reading comprehension, and written expression. The CCC was to reconvene in the future to further develop the IEP. The Student was not given personal notice of this conference and did not attend. On April 15, 1998, the Student's mother requested an evaluation for Central Auditory Processing. In April-May, 1998, the school psychologist evaluated the Student and found the following IQ scores: Verbal - 105; Performance - 100; and Full Scale - 103. The Student was found to be significantly below normal in reading, and the results were very similar to the independent evaluation. The school had the audiological evaluation performed on May 26, 1998. The Student was found to have auditory processing difficulties with small units of language phonemic components, but had

stronger skills in larger events (sentences).

The CCC was reconvened on June 11, 1998. The Student was not personally notified and did not attend. The CCC proposed that another CCC be held by October 31, 1998, and an assistive technology evaluation be held by November 1, 1998. The IEP proposed for the 1998-1999 school year provided that the Student be placed in two team-taught classes, English and biology, and that he receive support and remedial services one period per day, five days per week, with one-half of the period devoted to remedial activities and the other to assistance with homework. Direct special education services in the area of remedial and compensatory reading instruction were also to be made available on a daily basis. The Student was to receive team-teaching services and other assistance in the areas of written language and basic math calculation. The special education teacher stated that during the ½ period devoted to remedial activities that she would be working with 5 or 6 students. Further, this teacher had little knowledge of phonic type programs available at the public school.

The mother believed the school had verbally offered to provide summer education during the summer of 1998, but the school disputed this. On July 30, 1998, the mother's then attorney, by letter, advised the school that the student's mother would be placing the Student at a private school. The Student has never withdrawn from school. The Student enrolled in the private school in September, 1998, for his 9th grade year. The private school is a college preparatory school for learning disabled students with small classes of 8 to 10 students and during the 9th and 10th grades provides one-on-one instruction in reading and writing, using the Orton Gillingham system, plus modifications and adjustments to meet specific needs of the students.

In October or November, 1998, the Student, for the first time, was able to read a book and now seems to be interested in reading. The Student's educational program during his 9th grade year at the private school started at the basics of reading, using the Orton Gillingham method, plus modifications to meet his specific needs. The Student received one hour per day of one-on-one instruction in reading.

On March 19, 1999, the independent evaluator again evaluated the Student and found the Student had made substantial progress in decoding and phonics skills (from the first and second grade to the third and fourth grade) and had mastered a number of basic rules for pronouncing common letter patterns. The Student's reading comprehension remained relatively strong, and the Student's spelling skills had improved. On July 5, 1999, the Student's mother sent a copy of this independent evaluation to the school and requested reimbursement for the 1998-1999 expenses she incurred from the private school placement.

The school has not held a CCC for the Student since June 11, 1998, nor developed a new IEP for the Student. The Student believes he is learning at the private school, having learned for the first time how to decode words. The Student completed his 9th grade year at the private school and is enrolled at the private school for the 1999-2000 school year for his 10th grade year. The Student wishes to continue to attend the private school. The mother has incurred expenses at the private school for 1998-1999, for which she seeks reimbursement. The total reimbursement sought is \$50,128.67,

including \$1,150.00 for the independent evaluations and attorney fees of \$2,700. The mother seeks reimbursement of \$40,600.00 for the 1999-2000 school year.

Based upon the foregoing findings of fact, the IHO entered fourteen conclusions of law. The school violated Article 7 by not notifying and inviting the Student to the April and June, 1998 case conferences. 511 IAC 7-12-1(d)(6) and 511 IAC 7-12-1(g)(7). The proposed IEP is insufficient to permit the Student to benefit educationally. The Student has had poor word attack and decoding skills for years and the Student's previous IEPs failed to benefit the Student significantly. The fact the Student was receiving passing grades and moving from grade to grade was deemed a very small factor in determining whether the Student was receiving educational benefit compared to the Student's inability to do basic reading and properly decode words.

The school's June, 1998, IEP is not reasonably calculated to enable the Student to receive educational benefit and is inappropriate. It did not contain specialized instruction and related services which were designed specifically for the Student and his needs. The Student clearly required substantial one-on-one instruction. Even though the Student advanced from grade to grade, he has never learned to read. The school has not provided the "basic floor of opportunity" required by law and has provided the Student with an educational plan that is "likely to produce only trivial educational benefit."

The Student's mother provided adequate notice of her intention to place her child at a private school. The school has failed to raise any lack of notice and has hereby waived the same. The educational program at the private school is appropriate to meet the unique needs of the Student, and is reasonably calculated to enable the Student to receive educational benefit and has been providing educational benefit to the Student. In order for the Student to receive a free appropriate education for the 1998-1999 school year, the school should reimburse the parent the sum of \$47,743.67, which is \$35,600.00 for tuition and \$5,000.00 for the LT class.¹ In order for the Student to receive a free appropriate education for the 1999-2000 school year, the school should reimburse the parent the sum of \$40,600.00. The mother should be reimbursed the sum of \$1,150.00 for the costs of the independent evaluations, which were necessary to fully ascertain the Student's educational weaknesses and how to address such weaknesses. The IHO lacks the authority to award attorney fees. The school should prospectively pay the private school placement for the 2000-2001 and 2001-2002 school years until the school develops an appropriate IEP with appropriate goals and objectives to meet the unique needs of the Student.

Based upon the foregoing findings of fact and conclusions of law, the IHO issued the following specific orders:

¹The tuition and LT class costs are a total of \$40,600. The IHO has not indicated in his decision what the remainder of the reimbursement encompasses.

1. The LEA² shall pay the parent the sum of \$87,929.58 by March 1, 2000 for reimbursement of the parent's expenditures for the private school placement for the 1998-1999 and 1999-2000 and for the cost of the independent evaluations.
2. The LEA shall prospectively pay the costs of the Student's private school placement for 2000-2001 and 2001-2002 until such time that the LEA, through a case conference, proposes an appropriate IEP so the Student can continue to receive a free appropriate public education.

The IHO advised the parties of their right to appeal and the timelines for doing so.

PROCEDURAL HISTORY OF THE APPEAL

On January 31, 2000, the school timely requested an extension of time in which to file its petition for review. The Board of Special Education Appeals (BSEA) granted this request on February 1, 2000, giving the school until March 1, 2000, to file its appeal. The school timely filed its Petition for Review on February 29, 2000. The parties were notified that the BSEA would conduct its impartial review, without oral argument, on March 30, 2000. The parent's Reply was timely filed on March 9, 2000. In her reply, the parent requested oral argument and also moved to dismiss the school's petition for review as being untimely. The BSEA denied the request for oral argument by order dated March 10, 2000. The BSEA addressed the motion to dismiss at its review of this matter on March 30, 2000.

School's Petition for Review

In its Petition for Review, the school has objected to a number of findings of fact as being unsupported by substantial evidence or as being misleading or incomplete, which then led to erroneous conclusions of law. The school objects to the following findings of fact: Nos. 6, 8, 9, 16, 17, 18, 21, 24, 26, 27, 29, 30, 31, 33, and 34. The school objects to conclusions of law numbers 3 - 12, and 14 as being based upon findings of fact that are not supported by substantial evidence, arbitrary and capricious, and contrary to law. The school also claims the parent failed to provide the school sufficient notice of her unilateral enrollment of the Student in the private residential school, thereby precluding any claim for reimbursement. The school requests the BSEA to reverse the IHO's order requiring the school to reimburse the parent \$87,929.58 and to reverse the IHO's order that the school prospectively pay the costs of the Student's private school placement for the 2000-2001 and 2001-2002 school years. The school further requests the BSEA rule that the June 1998 IEP proposed for the Student provides for a free appropriate public education in the least restrictive environment.

Parent's Response

In her Reply to School's Petition for Review, the parent first requests the BSEA dismiss the Petition as not being timely filed. The parent argues that although the school requested, and was

²Local educational agency.

granted, an extension of time in which to file its appeal, the BSEA did not obtain jurisdiction of this matter until the petition for review was actually filed, which was beyond the 30 day timeline. The parent also claims that this matter should be dismissed as the school's request for extension of time was not sent simultaneously to the parent.³ The parent maintains the school had adequate notice of her intent to enroll the Student in the private residential school. In response to the school's challenge to the IHO's findings of fact and conclusions of law, the parent maintains the findings are amply supported by the record and the conclusions are legally valid. The parent urges the BSEA to either dismiss the petition for review as being untimely, or in the alternative, to uphold the decision of the IHO.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on March 30, 2000, to conduct its review of the above-referenced matter without oral argument. All members were present and had reviewed the record, the Petition for Review and Reply. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The IHO's decision was rendered on January 19, 2000. On January 31, 2000, the school filed a request for an extension of time within which to prepare and file a Petition for Review. This request was granted by order of the BSEA on February 1, 2000, granting the school an extension of time until March 1, 2000 to file its Petition for Review.
3. 34 CFR § 300.511 provides:
 - (a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing—
 - (1) A final decision is reached in the hearing; and
 - (2) A copy of the decision is mailed to each of the parties.
 - (b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review—
 - (1) A final decision is reached in the review; and
 - (2) A copy of the decision is mailed to each of the parties.

³While the parent makes this argument, the parent fails to offer any evidence to substantiate the claim that the school failed to provide her with a copy of its request for an extension of time. The school's written request, dated January 31, 2000, indicates that a copy was sent to the parent's representative. Because the parent has provided no affidavit or other evidence indicating the school did not send a copy of its request to the parent's representative on January 31, 2000, the BSEA must accept the written documentation in the record.

(c) *A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.* (Emphasis supplied).

4. The procedures for due process appeals are found at 511 IAC 7-15-6, which provide, in part:
 - (e) A petition for an impartial review of the decision of a hearing officer by the board of special education appeals may be initiated by any party to the hearing. The petition shall be:
 - (1) in writing;
 - (2) filed simultaneously with the division of special education and the opposing party;
 - (3) specific as to the reasons for the objections to the hearing officer's decision, identifying those portions of the findings, conclusions and orders to which exceptions are taken; and
 - (4) filed within thirty (30) calendar days of the date the hearing officer's decision is received by the other party.
 - (h) *Any petition for review that does not comply with the requirements of subsection (e) may be dismissed, in whole or in part, at the discretion of the board of special education appeals.* Only matters raised in the initial due process hearing may be raised in a petition for review.
 - (j) Within thirty (30) calendar days of the receipt of a petition for review by the division of special education, the board of special education appeals shall conduct an impartial review, develop a written decision and mail the written decision to all parties. *Specific extensions of time may be requested by any party to the appeal and granted by the chair of the board.* The chair shall respond in writing to all parties when a request for extension is made. (Emphasis supplied).

5. The procedures specified in 511 IAC 7-15-6 and 34 CFR § 300.511 give the BSEA the authority and discretion to grant an extension of time in which to file a petition for review. Indiana's procedures have been cited with approval by the United States District Court for the Southern District of Indiana. In L.M. v. Brownsburg Community School Corporation, 28 F.Supp.2d 1107 (S.D.Ind. 1998), the court granted the school's motion to dismiss, determining that it was within the discretion of the BSEA to dismiss the student's petition for review as being untimely, and that such a dismissal on timeliness grounds was not appealable to the district court. In L.M., the BSEA had dismissed the student's appeal as it was not filed within thirty (30) days after the IHO's decision. The student was represented by an attorney and there had been no request for an extension of time within which to file the petition. The district court cited with approval Indiana's procedures which would permit an extension of time. In a footnote, the court noted:

It should be noted that the dismissal by the BSEA could have been easily prevented. Indiana law governing appeals to the BSEA states that "[s]pecific extensions of time may be requested by any party to the appeal." Ind.Admin.Code tit. 511, r. 7-15-6(j). Plaintiffs had the opportunity, under this statute, to request an extension of time in order to prepare a timely appeal. Instead, they chose to file an untimely appeal and place the dismissal of their action within the discretion of the BSEA. Id. at 1111.

6. When a party fails to file a petition for review within thirty (30) days after receipt of the IHO's decision, dismissal is discretionary with the BSEA. Specific extensions of time may be requested, and granted, by the BSEA. In this case, the school timely requested, and was granted, an extension of time in which to file its Petition for Review. Dismissal is not warranted and would be contrary to Indiana's procedures for due process appeals.
7. The Student is sixteen (16) years old and in the 10th grade. He is currently attending a private school for students with learning disabilities as a result of a unilateral placement made by the parent.
8. The Student was identified as eligible for special education as a student with learning disabilities while in the third grade and received special education and related services, including pull-out services, through the LEA from third grade through eighth grade.
9. The Student's proposed IEP for the ninth grade provided for one class period daily of special education reading instruction, one class period daily of team taught 9th grade English, one class period daily of team taught 9th grade biology, one class period daily of team taught algebra, one class period of special education study lab with half of this period to be devoted to additional remediation and one-half of this period to be used for homework assistance. Team taught classes provided the assistance of a special education teacher in the classroom in addition to the general education teacher. Consultation services from an educational audiologist were to be provided bi-weekly. A number of accommodations were to be provided, which included preferential seating, extended time for assignments, study guides in content area classes, textbooks and novels on tape, tests reread for clarification of vocabulary, pre-teaching of vocabulary, shortened reading and written language assignments as appropriate, proofreading with a special education teacher, use of a calculator, and teacher-to-teacher consultation.
10. The proposed IEP for the Student's ninth grade year was based upon his individual needs as identified through the case conference committee. The case conference committee considered input from the Student's parent and the Student's teachers as well as the result of recent psychoeducational testing performed by the LEA and an independent evaluator.
11. The proposed IEP was reasonably calculated to enable the Student to receive educational benefit and was appropriate to meet his needs and to provide a free appropriate public education in the least restrictive environment.
12. The parent enrolled the Student in a private residential school for students with learning disabilities in July, 1998, and the Student began his 9th grade year at the private school in September, 1998.
13. The results of the independent evaluation obtained by the parent in 1998 are consistent with the LEA's evaluation. The LEA's evaluation was appropriate.

14. There is no evidence to indicate the parent sought an independent evaluation in 1999 due to any perception that the LEA's evaluation was not appropriate.
15. A parent may request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If the LEA's evaluation is appropriate, the parent may still obtain an independent evaluation, but such evaluation shall be at the parent's expense.
16. If a parent of a child who previously received special education and related services under the authority of an LEA enrolls the child in a private school without the consent of or referral by the LEA, the LEA may be required to reimburse the parent for the cost of that enrollment if the LEA had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and the private placement is appropriate. 34 CFR § 300.403(c).

All votes by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The parent's Motion to Dismiss is denied.
2. Finding of Fact No. 6 is amended to read as follows:

The student's IEP developed in February, 1993, provided for goals of:
 - (a) Improve written skills, including spelling; and
 - (b) Improve reading decoding and comprehension skills.The student received support services in reading and written language while in the regular classroom as well as pull-out instruction.
3. Finding of Fact No. 16 is amended only to correct the spelling of "ISTEP+."
4. The second to the last sentence of Finding of Fact No. 18 is amended to read as follows:

Once the student's reading improves, the remediation should integrate reading, writing and spelling.
5. Finding of Fact No. 27 is amended to read as follows:

The student was enrolled in the private school in July, 1998, and began attending classes there in September, 1998, for his 9th grade year (1998-1999).
6. Finding of Fact No. 29 is amended to read as follows:
In October, or possibly November, 1998, the student, for the first time, felt he was able to read

a book and now seems interested in reading.

7. Finding of Fact No. 31 is amended by striking the word “substantial” in the first sentence. The first sentence now reads:

On March 19, 1999, the independent evaluator again evaluated the student and found that the student had made progress in decoding and phonics skills (from the first and second grade to the third and fourth grade) and had mastered a number of basic rules for pronouncing common letter patterns.

8. Findings of Fact Nos. 33 and 34 are deleted and Findings of Fact Nos. 35 through 40 are re-numbered as Findings of Fact Nos. 33 through 38.
9. Findings of Fact Nos. 8, 9, 17, 21, 24, and 30 are accepted as written by the IHO.
10. Conclusion of Law No. 3 is modified to read, in its entirety, as follows:

The proposed IEP, based upon a determination of the unique needs of the student, with sufficient support services, is sufficient to permit the student to benefit educationally from that instruction.

11. Conclusion of Law No. 4 is modified to read, in its entirety, as follows:

The LEA’s June, 1998, IEP is reasonably calculated to enable the student to receive educational benefit and is appropriate.

12. Conclusions of Law Nos. 5 through 12 and No. 14 are deleted. Conclusion of Law No. 13 is re-numbered as Conclusion of Law No. 5.

13. The IHO’s Order No. 1 is amended as follows:

The LEA is not obligated to reimburse the parent for the parent’s expenses for the private school placement for the 1998-1999 and 1999-2000 school years or for the cost of the independent evaluations.

14. The IHO’s Order No. 2 is amended as follows:

The LEA is not obligated to pay the costs of the student’s private school placement for the 2000-2001 and 2001-2002 school years.

All other Motions or objections not specifically addressed herein are hereby deemed denied.

Date: March 30, 2000

/s/ Raymond Quist, Ph.D.

Raymond Quist, Ph.D., Chair
Board of Special Education Appeals